Supreme Court of the United States

OCTOBER TERM, 1943

No. 180

TRANSBAY CONSTRUCTION COMPANY, *Petitioner,*

v.

CITY AND COUNTY OF SAN FRANCISCO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Transbay Construction Company, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered March 19, 1943, rehearing denied June 1, 1943.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 3048-60) is reported in 134 F. (2) 468. The opinion of the District Court of the United States for the Northern District of California, Southern Division (R. 73-83), is reported in 35 F. Supp. 433.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1943 (R. 3062). A petition for rehearing was denied June 1, 1943 (R. 3062). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code Sec. 347).

QUESTION PRESENTED

Where the performance of a public works contract has been delayed by the contracting governmental agency and the cost of performing the contract has been radically and unreasonably increased, may the contract be deemed abrogated and the contractor permitted to recover the reasonable value of the work on a *quantum meruit*?

STATEMENT

On April 8, 1935, the petitioner, Transbay Construction Company, and the respondent, City and County of San Francisco, entered into a contract for the enlargement of O'Shaughnessy Dam at Hetch Hetchy, California, according to plans and specifications prepared by the respondent (Ct. Ex. 1, R. 270). The contract is of the comprehensive, municipal variety; it contains all the usual terms and provisions for the protection of the city, including the customary provision that the contractor shall not be entitled to damages for delays, whether avoidable or unavoidable (R. 270-318). The time for completion of the work was fixed at two years or 730 days (R. 302), and a penalty of $400 provided for each additional day required to complete the work (R. 306).

The petitioner planned to complete the work in about 22 months, or two months less than the time specified in the contract (R. 400). The respondent was fully

advised of petitioner's plan of work (R. 472, 2225-26, 2242).

At the time of the construction of the original dam the foundation for the addition had been laid in the bottom of the canyon, so that the petitioner was only required to excavate material from the side walls of the canyon. Petitioner planned to shoot down the proposed excavation from the north canyon wall during the period it was building its concrete plant and installing a twenty-ton cableway or high line across the canyon over the dam site. When the high line and the concrete plant were completed about November 1, 1935, the high line could be used for the removal of rock shot down from the canyon wall and for the placing of concrete at the bottom (on the north half of the dam) to a height of approximately 60 feet before the high water in the reservoir would compel the respondent to release surplus water from the lower set of outlet valves (R. 414, 2320, 2321). The spillway of the original dam discharged water only through the north section, so that during the high water period excavation work could be carried on at the south side of the canyon (R. 580). Thereafter the petitioner planned to place the concrete alternately on the north side and the south side of the canyon walls (R. 2321). The specifications indicated that the total amount of rock to be excavated was 30,000 yards which would be evenly divided between the north and south canyon walls. If no more than this amount had been removed, the petitioner would have had no difficulty in proceeding with the pouring of concrete on November 1, 1935, according to schedule (R. 2321-22). Respondent's conduct made adherence to schedule impossible.

Although Hetch Hetchy is within the boundaries of Yosemite National Park (R. 442), over which the Fed-

eral Government exercises exclusive jurisdiction, except for purposes not here material (*Collins* v. *Yosemite Park & C. Co.,* 304 U. S. 518), respondent permitted engineers representing the State of California, purporting to act under the authority of the California Dam Supervision Law (Deering's General Laws of California, 1937, Act 1950, Statutes of California, 1929, p. 1505; amended by Statutes of California, 1933, p. 2148), to exercise complete jurisdiction and authority over the work (R. 722-723). As a consequence, orderly procedure proved impossible. When the amount of excavation originally contemplated was shot down from the north canyon wall, the State Engineers instructed the respondent to remove additional excavation (R. 2322). By November 1, 1935, the petitioner, under instructions from the respondent, had shot down approximately 50,000 yards of excavation from the north canyon wall, which covered the northern portion of the dam on which the petitioner had scheduled its first pouring of concrete on November 1, 1935 (R. 460, 2322).

Furthermore, the original excavation plan provided for the rock to be removed on radial lines with fillets[1] (R. 371). Nevertheless the petitioner was at first directed by the respondent to remove the excavation on a step plan with the elimination of the fillets, which meant the saving of a certain amount of excavation (R. 745). After the petitioner had largely completed the excavation on the step plan, the State Engineer expressed disapproval. The petitioner was then required to return to areas already approved by the respondent and perform the excavation on radial lines (R. 371, 2390-

[1] A fillet was described by one of petitioner's engineers as a thickening of the dam where it joins the canyon walls, the purpose being to increase the bearing area against the canyon walls (R. 349).

94). After excavation had been approved in certain areas, the petitioner was required to re-excavate the same areas as many as four separate times before the excavation was approved by the State Engineer. This manner of removing excavation required a repetition of cautious drilling and shooting and of clean-up for inspection (R. 2530).

An additional complicating factor was the absence of any agreement, months after the work had started, between the State Engineer and the City Engineer as to whether the dam should act primarily as a gravity dam or an arch dam (R. 466). If it had been made to function as a gravity dam, it would have required much less excavation than if it was to function as an arch dam (R. 387).

By reason of the increase in the amount of the excavation and the delays caused by the manner in which the petitioner was required to remove the excavation, it was not until April 24, 1936 (R. 1636), that the petitioner was first permitted to pour concrete on the northern portion of the canyon at the bottom of the canyon, and within a few days thereafter the spring runoff of the river was in progress. Water was released from the lower outlet valves under great pressure in the area to be concreted, which interfered with the proper and economical progress of the work (R. 470, 577). Consequently, the first concrete work originally planned to be performed in a season free from water interference was performed at great additional expense and delay to the petitioner (R. 636, 582).

When the overrun in excavation and the consequent delay became apparent, the petitioner used every available means at its command to speed the work, but was delayed by a lack of agreement between the State and City Engineers as to the extent and design of the excava-

tion (R. 506-7; Ct. Ex. 20). The petitioner was finally required to excavate a total of approximately 84,000 cubic yards of excavation for the addition to the dam, or approximately 200% in excess of that indicated in the specifications (R. 710), the excavation being carried to an average depth of approximately 35 feet, or about twice the depth of the excavation for the original dam (R. 673). Because the additional excavation was ordered in small quantities, there was no time during the course of the excavation, after the job had been equipped to handle the amount of excavation originally contemplated, when it would have been efficient or practical to provide for additional excavation equipment (R. 338, 339). Thus, the excavation which was started on July 17, 1935 (R. 1635), and should have been completed by November 1, 1935, was not accepted by the respondent until July 25, 1936 (R. 1636) more than eight months later.

In addition to the delay caused by the manner in which the petitioner was required to perform the additional excavation for the dam foundation, it was delayed in starting grouting [2] operations, thus being prevented from completing the grouting simultaneously with the other items of the contract. Petitioner endeavored to prepare for and start grouting on the original

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[2] Grout is a mixture of cement and water about the consistency of light cream (R. 644). The specifications called for the contractor to grout the seams in the old dam and the contraction joints in the new dam. Grout is forced into the cracks and the contraction joints under pressure from 50 to 500 pounds per square inch (R. 642). To confine the grout to a given area it is necessary to install water stops to prevent the grout and water from leaking through the cracks on the outside of the dam (R. 643). Before grouting the old dam it was necessary to caulk the cracks and joints with steel wool (R. 644).

dam and on the portion of the new dam which had been cooled as early as July 1937. After the petitioner with the approval of the City Engineer had commenced the caulking of the dam preparatory to grouting, it was advised that the State Engineer had disapproved of the plan and that it would not be permitted to do the grouting until approximately three months after the remainder of the work had been completed (R. 696, 697). There is nothing in the specifications to indicate that the grouting of the existing dam could not have been performed at any proper time the petitioner might elect to do it. The grouting was finally commenced in December 1937 (R. 697), at which time practically all of the work, with the exception of a few minor items, had been completed. During the grouting period it was necessary to maintain camp facilities, the cook house, dormitories, and supervision chargeable only to the operation of grouting (R. 828, 829, 2532).

The delays caused by the manner in which the petitioner was required to remove the additional excavation and other delays caused by respondent increased the cost of performing the work by approximately $791,000, or about 23% of the contract price (R. 205). Repeated protests were made against the respondent's conduct both orally and in writing (R. 463-464-467, 475-480). On November 25, 1936, the petitioner served written notice that the delays had resulted in a material and substantial departure from the original contract, that it would complete the work only under protest and that it reserved the right to claim additional and further compensation because of the departure from the original contract (R. 475). No objection was made to the statements contained in this notice.

The District Court held the contract abrogated and petitioner entitled to recover the reasonable value of

the work performed, together with a reasonable profit (R. 81, 93). Evidence as to reasonable value and profit was taken before a Special Master. He reported that the work had been performed by petitioner economically, efficiently, and in a good workmanlike manner (R. 200), that the reasonable value of the work, together with a reasonable profit, amounted to $4,248,254.03 (R. 204), and that the balance due was $791,253.34 (R. 205). The District Court approved the report of the Special Master (R. 246) and entered judgment in favor of the petitioner.

The Circuit Court of Appeals reversed, holding that since the petitioner had completed the work, it could not treat the contract as abrogated by the respondent's acts and recover the reasonable value of the work done (R. 3057).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred

1. In holding that petitioner could not treat the contract as having been abrogated and recover the reasonable value of the work;

2. In failing to hold that the petitioner could recover in *quantum meruit* by reason of the fact that circumstances unanticipated by the parties had radically increased the cost of the work to be performed under the contract;

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals did not question the findings of fact of the District Court and the Special Master, and indeed it could not, since there was ample evidence to support them. Summarized most briefly,

the findings show that there were radical changes in the character and amount of work under the contract as well as unreasonable delays in its performance caused by respondent. Both the changes and the delays greatly increased the expense of performance. The contract which should have been performed in less than two years and would have resulted in a profit to the petitioner (R. 399) required three years to perform and resulted in a loss in the sum of $405,048.43 (R. 204-05).

The District Judge applied an elementary and just principle in the law of contracts, holding that the respondent had forfeited the right to force the terms of the contract upon the plaintiff. It said:

> "Circumstances unanticipated by the parties made radical changes in the character and amount of the work to be performed under the contract, greatly increasing the expense thereof. I think that the contract may be deemed abrogated and plaintiff should be permitted to recover on a quantum meruit basis." (R. 81, 35 F. Supp. at 436).

The Circuit Court of Appeals reversed with the astounding statement that the judgment of the District Court appeared "unsupported by reason or authority" (R. 3056). But the rebuke would be more appropriately applied to the opinion of the appellate court which confined itself to distinguishing, on erroneous grounds, the cases cited by the trial court and admitted by the Circuit Court of Appeals itself to represent "an enlightened development of the law of contracts" (R. 3060). For, in the words of a commentator upon the District Court's decision, "The result reached * * * is not unusual." Note (1941) 51 *Yale L. J.* 162, 163.

Clearly the right lay with the petitioner. The respondent had unreasonably caused a year's delay in

the performance of the work which radically and unreasonably increased the cost of performing the work. Under the circumstances the Court should not have proved astute to deny the petitioner all relief and to saddle it with three years' service to the respondent at the loss of nearly one-half a million dollars. Even on the Circuit Court of Appeals' own view of the decisions which it held inapplicable, it should not have foreclosed the petitioner from recovering in *quantum meruit* at least for the work performed in excess of that called for by the contract.

In these circumstances we believe we would be justified in asking the Court to review the decision below on writ of certiorari on the ground that the Circuit Court of Appeals had so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. There are, however, two additional cogent reasons why this Court should grant the petition for the writ.

1. The decision of the Circuit Court of Appeals is untenable and therefore probably in conflict with the law of the State of California. See *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206. The decision below presents an important question of local law. Although it is true that the appellate courts of the State of California have not expressly ruled upon the issue, it must be assumed that the California rule conforms to the recognized and established principles of law governing the interpretation of public contracts, as expressed by the Supreme Court of the United States, the Circuit Court of Appeals for the Eighth Circuit, other courts and text writers. California courts not only consult but follow the sound decisions of such other courts, especially when supported by the reasoned comments of

eminent writers. That is exactly what the District Judge did in this very case.[3]

In numerous cases where the cost of performing the contract has been unreasonably increased and the contractor has completed the work, the courts have held the contractor may recover the reasonable value of all the work performed. See, *e.g.*, *Salt Lake City* v. *Smith*, 104 Fed. 457 (C. C. A. 8); *United States* v. *Stage Co.*, 199 U. S. 414; *Freund* v. *United States*, 260 U. S. 60; and *Hayden* v. *City of Astoria*, 74 Ore. 525, 145 Pac. 1072. See also 4 Elliott, *Contracts*, sec. 3697.

In *Salt Lake City* v. *Smith*, 104 Fed. 457, the cost of performing the contract was radically increased by requiring the contractor to perform an unreasonable amount of additional work of the same character as that provided for in the plans and specifications, and additional work not of the same type as that described in the specifications. The contractor did not rescind the contract, but completed the work. The court held that the contractor could recover the reasonable value of the work performed. In this connection the court said:

> "Upon this question the court below held upon the trial, and finally charged the jury, in effect, that the city had no right to require the contractors

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[3] In this connection it is at least interesting to note that Judge St. Sure, who made the decision in the District Court, began the practice of law in California in 1895 and, prior to his appointment to the United States District Court for the Northern District of California, served as Judge of the Superior Court of Alameda County, California, and Associate Justice of the District Court of Appeal, First District of California. On the other hand, the members of the Circuit Court of Appeals come from Idaho, Oregon and Washington, and prior to their appointments to the Court practiced law in those states.

> to perform large quantities of work, radically different in its character, nature, and cost from that originally contemplated by the parties when they made their contract, and that, if it had required such work, *the plaintiffs were entitled to recover its reasonable value.* This was the theory upon which the case was tried, and it was the true theory. It is just to the city, fair to the contractors, and it accords with reason and established law. * * * Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, *for which the contractors may recover its reasonable value.*" (104 Fed. at 465-66, italics supplied.)

In *United States* v. *Stage Co.*, 199 U. S. 414, the contractor entered into a contract with the United State Government for carrying mail in the City of New York. After the contract was entered into a new distribution station was established with the result that the contractor was required to purchase additional equipment and the cost of performing the contract was radically increased The contractor did not rescind the contract, but completed the work. This Court held that the contractor was entitled to additional compensation for the additional work performed.

In *Freund* v. *United States,* 260 U. S. 60, the contractors, after having entered into an agreement with the United States Government to carry the mails over a certain route, were given notice that a different and more expensive route had been substituted for the one designated in the contract. The contractors protested, but performed the services and accepted periodic payments until the work was completed. This Court held

that they were entitled to recover the reasonable value of all the work performed, together with a reasonable profit.

In *Hayden* v. *City of Astoria,* 74 Ore. 525, 145 Pac. 1072, the contractor, after performing a contract similar to the one before this Court, was permitted to recover the reasonable value of the entire work. In holding that the contractor was entitled to recover on a *quantum meruit* the court said:

> "It is the rule that in carrying out a contract, whether time is of the essence or not, the owner cannot delay or retard the contractor in the progress of the work or prevent performance thereof without liability; and, where the owner under the contract is bound to furnish materials or do any other thing required to be done by him pursuant to the contract, he must do that thing in such a way as not to retard the contractor; *and, if through the act or omission of the owner under such circumstances the work is delayed in such a way as to make performance impossible, the contractor can recover upon the quantum meruit*" (145 Pac. 1074, italics supplied.)

It will be noted that in each of the foregoing cases in which the cost of performing the work was unreasonably increased, the contractor failed to rescind the contract, completed all of the work, accepted the periodic payments provided for by the contract, and nevertheless was permitted to recover the reasonable value of all the work performed.

2. The decision of the Circuit Court of Appeals presents a question of importance in the administration and interpretation of public contracts. The present case has become a focal point of interest to those en-

gaged in contracting on similar public works of like magnitude. Throughout it has been conceded that the petitioner performed its contract with the respondent economically, efficiently, and in a good workmanlike manner, and that due to the fault and neglect of respondent the cost of performing the work was increased by the sum of approximately $791,000, the amount of the judgment in the District Court. The increase in cost amounts to approximately 23% of the contract price. It cannot be denied that the increase in cost is radical, material, and substantial. The effect of the decision of the lower court in the present case must be considered by contractors in submitting proposals for public work. They will be required to consider the possibility that work may be delayed by a governmental body without limit and that the cost of performing the work may be radically increased without the possibility of recovering adequate or any compensation. If contractors have no assurance that they may receive adequate compensation when such contracts are performed economically and efficiently, then it would seem clear that competitive bidding for the construction of public works will no longer be predicated on estimated costs but will necessarily have to include the risk factors unjustifiably introduced by this decision. The result will of course be reflected in exorbitant proposals for the construction of public works. As noted by a commentator on this very case, the result here reached would "lead to a collective increase in the amount of bids by all bidders in which case the municipality would be charged excessively for those projects in which unforeseen difficulties fail to materialize." (1941) 51 *Yale L. J.* 162 at 163-64. For that reason it is important that this Court review and reverse the untenable decision of the Circuit Court of Appeals.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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July, 1943.

(7070)

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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This case involves only a question of local law. There is no showing in the petition that the decision of the Circuit Court of Appeals is probably, or at all, in conflict with applicable local decisions, as required by Rule 38(5) of the Supreme Court. Moreover, the petition contains so many inaccuracies and irrelevancies, and omits so many of the controlling factors, as to present an untrue picture of the question presented.

The contractor agreed to complete the contract within 730 days (R. 302), but it was provided that additional time might be granted the contractor on account of unavoidable delays (R. 302, 303), which were defined as being delays resulting from causes beyond the control of the contractor and against which it could not have provided, including orders of the public authority changing the work or the manner of its performance (R. 303, 304). It was further provided that apart from extensions of time for unavoidable delays, no payment or allowance of any kind should be made to the contractor on account of delay from any cause in the progress of the work, whether such delay was avoidable or unavoidable (R. 305, 306). All requests for extensions of time within which to complete the contract were sought and made by Transbay; none by the City.

One of the items of work to be done was excavation to sufficient depth to secure a foundation on sound ledge rock, as determined by the engineer (R. 309). The specifications contained an estimate of the quantity of excavation as being 30,000 cubic yards, but it was stipulated that this and other estimates were for the purpose of comparing bids only and that the city did not agree that the actual amount "will correspond even approximately to this estimate", but reserved the right to increase or decrease the amount or eliminate items (R. 296-297). Payment for the excavation was to be made on a unit bid price basis of $2.75 per cubic yard. Transbay was paid at this rate for all the 84,000 cubic yards of excavation.

The work done under the contract was precisely the work called for by it; there was no change whatever in the character of the work. The dam as completed was exactly the dam contemplated in the contract and the specifications. Its nature as an arched gravity dam was not changed in any degree during the progress of the work (R. 422, 531, 729, 780, 1556). Counsel for petitioner stipulated that the dam as finally completed was not at all different from the dam shown on the plans and specifications (R. 1670, 1671). The sole claim upon which the present suit was based was that by reason of the manner in which the excavation was ordered, completion was delayed and the cost of the work to the contractor thereby increased. The testimony of the contractor showed that the mere fact of the increase *in the amount* of necessary excavation over the estimate did not result in any undue burden (R. 588, 589, 590, 413, 741, 742). All the references in the petition, therefore, to cases which deal with a change in the *character* of the work to be done, and to the fact that the necessary excavation was greater than the estimate for comparison of bids, are wholly beside the point. The sole ground of complaint was delay and the sole question considered by the Circuit Court of Appeals was the nature of the remedies "available to the contractor where delay was caused by the city's orders for excavation".

What actually happened, as appears from the opinion of the Circuit Court, was that after the necessity for an extension of time became apparent, the contractor applied to the city for an extension of time

under the contract on the ground that the delay was unavoidable. Later other extensions were granted "upon Transbay's statements that further unavoidable delays had occurred". Upon completion the contractor was paid the full unit contract prices.

After completion the contractor filed a claim for $450,464.46 for damages for delay. This claim was reasserted in the first count of the complaint in the present action, but by bill of particulars was reduced to $386,226.14. No recovery was allowed by the trial court on this claim because of the fact that the claim was not presented within the time required by the city charter. What the trial court did, however, was to allow the contractor, on the ground of delay, to treat the whole contract as abrogated or rescinded and to award it, without regard to the contract prices, and on the basis of an abrogation of the contract, the value of all work done and materials furnished, plus a profit (which profit was fixed at $386,227.14), less the amount of payments received. This resulted in a judgment in the sum of $791,253.34, or approximately twice the amount of the total damage claimed for the delay. This award was made by the District Court notwithstanding the fact that the contractor had never at any time elected to rescind the contract, but on the contrary, after full knowledge of the facts, had sought extensions under the contract and elected to proceed under its terms.

The Circuit Court of Appeals found it unnecessary to decide whether or not the contract provisions pre-

cluded the contractor from recovering damages on account of the delay. We believe that they did. Indeed, counsel for the contractor, in their petition for rehearing before the Circuit Court of Appeals, conceded that no damages could be recovered (wholly apart from the limitations of the charter) under the recent decision of this court in *United States v. Rice,* 317 U. S. 61, involving a contract not nearly as stringent against the contractor as the one here involved. But the Circuit Court of Appeals held that, wholly irrespective of our contention in this regard, and even assuming for the purpose of decision that the orders of the city were so unreasonable as to amount to a breach of contract, nevertheless under the well-settled California rule the contractor could not recover on the basis of a rescission where he had not elected promptly to rescind upon discovery of the facts. The court called attention to the controlling California statute and decisions as follows:

> "The suit is governed by local law. The California Civil Code, §1688, provides that a contract is extinguished by its rescission. Section 1691 of the Civil Code states: 'Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right * * *' This statute has been strictly applied by the California courts. Wills v. Porter, 132 Cal. 516, 521, 64 P.

896; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 159 P. 163; see California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593."

The court further said that "Transbay does not question the force of local rules; indeed, it does not even claim to have rescinded", and upon the basis of the local law thus clearly established, it reversed the judgment of the District Court.

The present petition does not mention either the California statute or the California decisions cited by the court below. It cites cases from other jurisdictions involving no question of delay at all, but situations where the public authority required a *character of work different from or additional to that contemplated by the contract.* There is no need to discuss these decisions. Some of them hold that where new work is ordered and the contract departed from, the contractor may recover in *quantum meruit* for the extra work. But here no extra work was ordered. The contract was in no respect departed from. The delay was treated by both parties as coming within the contract terms. In none of the cases relied upon by petitioner was the contractor allowed, after completion of the contract, to disregard the contract measure of compensation for the work done thereunder and substitute for what had proved to be an unprofitable bargain, a more profitable recovery for work described in the contract.

The petition is so utterly devoid of any discussion of the local law, and the authorities relied upon are so

utterly inapplicable, that we do not pursue the matter further except to point out certain inaccuracies in the petition.

For instance, it is untrue, as stated in the petition, that "the specifications indicated that the total amount of rock to be excavated was 30,000 cubic yards, which would be equally divided between the north and south canyon walls", for there was no indication in the specifications as to how the excavation would be divided between the two sides of the canyon. When the petitioner speaks of the amount of the excavation "originally contemplated" as having been exceeded, it refers only to the estimate for comparison of bids, which might under the contract be increased, diminished or eliminated without any incurring of liability on the part of the city.

The discussion of a possible change in the nature of the dam is wholly irrelevant; the dam as built was precisely the dam contemplated by the specifications (R. 1670) and the discussion had nothing to do with any delay in completion (R. 745, 747). This of necessity was the case as the structure erected was the addition to an existing dam. Likewise immaterial is the reference to grouting, for, as pointed out by the Circuit Court of Appeals, any expense caused by delay in grouting was inconsequential, even under plaintiff's own claim of damage. The contractor's witnesses agreed that the only substantial detriment which they suffered related to the excavation (R. 1285). Indeed, in plaintiff's claim for damages only one-sixtieth of the damage was attributed to the element of grouting.

If Transbay is allowed to prevail in this suit, the effect of it would be to forever destroy competitive bidding. A municipality would, if Transbay prevails, never be in a position to know whether it had a firm contract for public work or not. A contractor could bid, then disregard his contract and thereafter sue in *quantum meruit*. This would be disastrous to the conduct of municipal affairs.

It is respectfully submitted that the petition is wholly without merit and should be denied.

Dated, San Francisco, California,
August 11, 1943.

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v.
CITY AND COUNTY OF SAN FRANCISCO, *Respondent.*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

We regret the necessity of a reply brief. But the respondent's brief in opposition leaves no choice. The baseless accusation of inaccuracies leveled against the petitioner cannot remain unchallenged, and the respondent's own inaccuracies require exposition and correction. Not the least of these is respondent's distortion of the nature of the petitioner's cause of action.

Although the respondent indulges in wholesale charges of inaccuracies (Br. p. 1), it cites only one specific instance, which, as will be shown, is completely supported by the record. The single claimed inaccuracy is referred to as follows (Br. p. 7):

> "For instance, it is untrue, as stated in the petition, that 'the specifications indicated that the total

> amount of rock to be excavated was 30,000 cubic yards, which would be equally divided between the north and south canyon walls,' for there was no indication in the specifications as to how the excavation would be divided between the two sides of the canyon."

It cannot be denied by respondent that the amount of excavation was estimated in the specifications at 30,000 yards (R. 297). True, there is no direct statement in the specifications that excavation would be divided equally between the north and south canyon walls, but not only is this the only reasonable inference, as the plans showed excavation on both canyon walls, but there is testimony in the record directly supporting the statement in the petition:

> "The specifications call for 30,000 yards to be removed from the canyon walls. The plans showed that approximately half of this excavation, or 15,000 yards, would be removed from the northerly, or right bank, of the canyon wall, and about 15,000 yards from the southerly, or left bank" (R. 1183).

Thus, the "so many inaccuracies" (Br. p. 1) boil down to one example which turns out to be, not inaccurate, but completely accurate. On the other hand, the respondent's brief contains serious inaccuracies.

The most serious of these is respondent's persistent distortion of the petitioner's cause of action.[1] The purpose of the respondent's brief is to convey the erroneous impression that this is a case in which additional excavation has been required because of unsatisfactory rock conditions and that the petitioner's claim is based solely upon the delay caused by the removal of additional excavation (Br. pp. 3, 4, 6). Counsel for the respondent desire the Court to believe that the claim is

[1] It was urged upon the Circuit Court of Appeals.

based solely on delay,[2] presumably because under the specifications and the authorities recovery for delay alone is extremely doubtful (R. 305, 306). *Cf. United States* v. *Rice*, 317 U. S. 61; *Hansen* v. *Covell*, 218 Cal. 623. But although it is true that the first cause of action in the complaint was based upon delay, the theory of the second cause of action—and the one upon which the trial court allowed recovery—is that the cost of the work was so unreasonably increased by the acts of the respondent that the petitioner was in fact required to perform a contract substantially different in cost from the one agreed upon by the parties.

As part of its contention that the petitioner complained only of delay, the respondent alleges that the dam "as completed was exactly the same as that contemplated in the contract and specifications. Its nature as an arched gravity dam was not changed in any degree during the progress of the work." (Br. p. 3.) The first part of this statement is not wholly true and by itself is meaningless; the second flies in the face of the record.

The dam was not exactly the same as that in the specifications, since there was the additional excavation. Moreover, the fact that the dam may *ultimately* have been the same in no way meets the petitioner's claim

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[2] In its effort to make this point, the respondent misstates the basis of the District Court's decision. The trial judge did not allow recovery "on the ground of delay," as contended by respondent (Br. p. 4). The fact is that petitioner was given judgment by the trial court because the changes in the character and amount of the work greatly increased the cost. The court said:

> "Circumstances unanticipated by the parties made radical changes in the character and amount of the work to be performed under the contract, greatly increasing the expense thereof" (R. 81).

that the respondent's acts unreasonably and unnecessarily increased the cost of performing the work. The most direct cause of this increase was the fact that, after the petitioner had commenced work, there was a complete lack of agreement between the State and City engineers as to what extent the dam when finally completed should function as an arch or a gravity dam. This, of course, was a risk the petitioner had not anticipated and could not be expected to assume. The testimony is uncontradicted that, ten months after work had commenced, no decision had been reached between the State and City engineers as to whether the dam when completed was to function primarily as an arch dam or a gravity dam (R. 387). If the dam had been made to function as a gravity dam, it could have been made safe with much less excavation than was actually removed (R. 387).

Furthermore, because State and City engineers could not for some time reach a final decision as to the extent to which the dam should act as an arch or as a gravity dam, constant changes were made during the progress of the work in the nature and type of the excavation, the elimination of fillets, and the manner in which the grouting was to be performed, all of which directly affected the extent to which the dam when completed would function as an arch or a gravity dam (R. 371, 745, 2390-2392, 2530). The evidence showed that there was a period when the petitioner was building "something different" from the design in the specifications (R. 422) and that only "eventually" was the dam built to that design (R. 531). There was some testimony to the effect that there were no basic changes in design during the progress of the work (R. 1556), but it was by a City engineer who, on cross-examination, admitted that the he was employed in the office in San Francisco

during the progress of the work and was only occasionally at the site of the job. Hence the statement that the nature of the dam as an arched gravity dam was not changed in any degree during the progress of the work is contrary to the record.

We pass now to another statement by respondent (Br. p. 3) to the effect that the petitioner's testimony showed that the mere fact of increase in the amount of necessary excavation over the estimate did not result in any undue burden. This statement is misleading. The record discloses that the witness stated that if the petitioner had been informed originally that 84,000 yards of excavation would be required rather than 30,000 yards, additional equipment could have been provided for removing the additional excavation without any delay, but that the manner in which the contractor was required to perform the excavation greatly increased the cost of the entire job.[3]

The respondent dwells at some length upon the provisions of Sections 1688 and 1691 of the Civil Code of the State of California which provide the manner in which a contract may be rescinded in that state. It is not clear why the lower court and the respondent refer to these sections, since they have no application whatsoever where the parties have so far departed from the terms and provisions of the original contract that their consent to the abrogation or rescission of the original contract must be implied. This, in our opinion, is the effect of the cases cited in the petition for a writ of certiorari.

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[3] The witness stated that the difficulty was in "going back over and over the same ground, taking off a little and going back and taking off a little bit more, and just doing that constantly, repeating it constantly * * *" and in "Waiting for the job to go ahead" (R. 590).

See Petition, pp. 11-13. In each case the contractor completed the work required to be performed and recovered the reasonable value of the work, on the theory that the cost of performing the contract had been so unreasonably increased that the original contract had been abrogated or abandoned by the acts of the parties.[4]

Moreover, that is also the rule in California. If the lower court intended to hold that the consent of the parties to the rescission of a contract could not be inferred from their actions, then its decision is clearly in conflict with the decisions of the appellate courts of California. See *Tatterson* v. *Kehrlein*, 88 Cal. App. 32; *Jones* v. *Noble*, 3 Cal. App. 316; *Lohn* v. *Fletcher Company*, 38 Cal. App. (2d) 26. In the latter case the court said:

> "Abandonment of a contract is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transaction out of which the abandonment is claimed to have resulted. It may be implied from the acts of the parties." (*Id.* at p. 30.)

Nor is it true, as contended by respondent (Br. p. 6) that

> "In none of the cases relied upon by petitioner was the contractor allowed, after completion of the contract, to disregard the contract measure of compensation for the work done thereunder and substitute for what had proved to be an unprofitable bargain, a more profitable recovery for work described in the contract."

In each of the cases cited in the petition, the contractor, after completing the work, was permitted to

[4] It should be noted that respondent's brief cites no cases to the contrary.

recover the reasonable value of the work performed, because the other party to the contract had unreasonably increased the cost of performing the work.

Finally, the alarming consequences feared by respondent (Br. p. 8) are wholly beside the point. Municipalities will have firm contracts if they do not impose upon contractors unreasonable methods of performance which drastically increase the cost of the work. All the petitioner prays is that the respondent bear the cost it so needlessly caused. If consequences are to be feared, they are the consequences certain to ensue if the lower court's decision stands unreversed. See Petition, pp. 13-14.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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